**U-Haul Company of Nevada, Inc. *and* International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO.** Cases 28–CA–19441 and 28–CA–20001

November 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 27, 2004, in Case 28–CA–19441, and a charge filed on October 25, 2004, in Case 28–CA–20001,[1] the General Counsel issued the consolidated complaint (the complaint) on December 17, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 28–RC–6159.[2] (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, with affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On February 11, 2005, the General Counsel filed a Motion for Summary Judgment. On February 25, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the General Counsel filed a brief in reply to the Respondent's response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the certification based on its objections to conduct alleged to have affected the results of the election in the representation proceeding. In its answer and response to the Notice to Show Cause, the Respondent also raises a number of other arguments in opposition to the General Counsel's motion, including that: (1) the certified unit may no longer be appropriate in light of the closure of its Henderson, Nevada facility, which is one of two facilities expressly included in the certified unit; (2) the unfair labor practices alleged in the complaint are barred by Section 10(b) of the Act; and (3) the General Counsel was required to consolidate this case for hearing with Cases 28–CA–18575, et al., in accordance with the Board's decisions in *Peyton Packing Co.*, 129 NLRB 1358 (1961), and *Jefferson Chemical Co.*, 200 NLRB 992 (1972).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

With respect to the Respondent's contention that the certified unit may no longer be appropriate, we find, initially, that the Respondent has failed to show that with due diligence it could not have brought forth evidence pertaining to the closure of the Henderson facility within a reasonably short period of time after its implementation. The Respondent first brought this evidence to the Board's attention in its response to the Notice to Show Cause, which was filed on March 11, 2005, despite the fact that the closure of the facility allegedly occurred in December 2003, approximately 2 months before the Board issued its certification of representative in Case 28–RC–6159. In these circumstances, we find that the alleged evidence should not be considered newly discovered or previously unavailable and does not constitute special circumstances warranting relitigation of issues raised in the representation case.

In any event, even if the Respondent's contentions in this regard were timely raised, we would find no merit to them. On September 30, 2005, Administrative Law Judge John J. McCarrick issued a decision in Cases 28–CA–18575, et al., finding, inter alia, that the Respondent had closed its Henderson facility following the election for discriminatory reasons and terminated most of the unit employees in violation of Section 8(a)(3) of the Act. The judge also found that the Respondent violated Section 8(a)(5) by closing the Henderson facility without notice to, or bargaining with, the Union. Based on these and other unfair labor practices alleged in the consolidated complaint in Cases 28–CA–18575, et al., and found by the judge, the judge issued a recommended

[1] The Respondent in its answer to the complaint neither admits nor denies the filing and service dates of the charges. Copies of the charges and affidavits of service are attached as Exhs. 19–22 to the General Counsel's motion and the Respondent has not contested the authenticity of these documents in its response to the Notice to Show Cause. Accordingly, we find that the Respondent has not raised any issue regarding filing and service of the charges warranting a hearing. See, e.g., *Shore Club Condominium Assn.*, 340 NLRB 700 fn. 1 (2003); *Corrections Corp. of America*, 330 NLRB 663 (2000), enfd. 234 F.3d 1321 (D.C. Cir. 2000).

[2] On October 13, 2004, the Respondent filed a motion to reopen the record in Case 28–RC–6159. By unpublished Order dated June 6, 2005, the Board denied the Respondent's motion.

order requiring the Respondent, inter alia, to reestablish the Henderson facility, offer reinstatement to unit employees formerly employed there, and bargain with the Union in the two-facility unit, based on a preelection card majority.[3] Moreover, regardless of whether the Respondent will ultimately be required to restore operations at the Henderson facility, it appears that the Respondent has had, and continues to have, at a minimum, an obligation to bargain with the Union over the effects of its decision to close the facility on unit employees formerly employed there. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). Accordingly, the fact that the Henderson facility has closed does not render the certified unit inappropriate or give rise to unusual circumstances justifying the Respondent's refusal to bargain. See *Pony Express Courier Corp.*, 286 NLRB 1286, 1289–1290 (1987) (closure of two of four facilities included in certified unit); *Baldwin League of Independent Schools*, 281 NLRB 981, 983 (1986) (closure of one of three facilities included in certified unit). We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find no merit in the Respondent's contention that the complaint allegations should be barred as untimely. Neither the Respondent's answer nor its response presents any legal or factual basis for this defense, and we note that the unfair labor practice charges and complaint allegations are consistent with the time provisions of Section 10(b) of the Act.

Finally, we reject the Respondent's contention that the General Counsel was required to consolidate this case for hearing with Cases 28–CA–18575, et al., in accordance with the Board's decisions in *Peyton Packing Co.*, supra, and *Jefferson Chemical Co.*, supra. Although not acknowledged by the Respondent, the Board, in *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 (1997), narrowly limited the application of *Peyton Packing* and *Jefferson Chemical* to situations where the General Counsel is attempting to twice litigate the same act or conduct as a violation of different sections of the Act, or to relitigate the same charges in different cases. The Board stated:

> [E]xcept in the specific circumstances presented in *Peyton Packing* and *Jefferson Chemical*, where the General Counsel has attempted to "twice litigate the same act or conduct *as a violation of different sections of the Act*," *NLRB v. Plaskolite, Inc.*, 309 F.2d 788, 790 (6th Cir. 1962) (emphasis in original), or to relitigate the same charges in different cases, the Board has recognized that such a blanket rule in favor of consolidation would improperly interfere with the General Counsel's discretion and, in some cases, could unduly delay the disposition of pending cases. [Citing *Maremont Corp.*, 249 NLRB 216, 217 (1980) and *Harrison Steel Castings*, 255 NLRB 1426, 1427 (1981).]

Here, the General Counsel is not attempting to twice litigate the same conduct as a violation of different sections of the Act or to relitigate the same charge in different cases. As explained by the General Counsel, Cases 28–CA–18575, et al. are unfair labor practice cases in which the General Counsel seeks a remedial *Gissel*[4] bargaining order, while the current matter is a test of certification arising out of representation Case 29–RC–6159. Accordingly, the decision to separately litigate the conduct alleged in the instant complaint is within the discretion of the General Counsel. The discretion of the General Counsel will be upheld absent a showing of arbitrary abuse. *Service Employees Local 87*, 324 NLRB at 776.[5] Even where the General Counsel fails to consolidate cases that the Board believes should have been consolidated, the Board will not dismiss the complaint in the absence of a showing of prejudice to the respondent. Id. The Respondent has not shown an abuse of discretion or prejudice.[6]

In sum, we find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding and, accordingly, we grant the Motion for Summary Judgment.[7]

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times the Respondent, a Nevada corporation, with an office and place of business located at 989

[3] We express no opinion here regarding the merits of the consolidated complaint allegations in Cases 28–CA–18575, et al.

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[5] Chairman Battista does not pass on the issue of whether, absent an abuse of discretion, the Board is bound by the General Counsel's decision concerning consolidation of cases. However, he agrees that the decision here was appropriate.

[6] Contrary to the Respondent, there is no risk of inconsistent adjudication arising from the fact that U-Haul of Nevada (UHN) is the only named employer here, while the consolidated complaint in Cases 28–CA–18575, et al., names UHN and U-Haul International, Inc. (UHI) as a single employer. The question of whether UHN and UHI constitute a single employer is not before us in this case, and we express no opinion regarding that issue. We note, moreover, that the issue does not affect our analysis or resolution of the refusal-to-bargain allegation in this case, as the Respondent's status as an employer of the unit employees was established in the underlying representation case, and the Respondent does not challenge that finding.

[7] The Respondent's request that the complaint be dismissed is therefore denied.

South Boulder Highway, Henderson, Nevada (the Henderson facility), and with an office and place of business located at 1900 South Decatur Boulevard, Las Vegas, Nevada (the Decatur facility), has been engaged in the business of repairing rental vehicles and trailers.

During the 12-month period ending April 27, 2004, the Respondent, in conducting its operations described above, derived gross revenues in excess of $500,000, and purchased and received at the Decatur facility goods valued in excess of $50,000 directly from points outside the State of Nevada.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. The Certification*

Following the election held on May 7, 2003, the Union was certified on February 9, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:[8]

> All full-time and regular part-time brake/tire specialists, detail specialists, engine specialists, mechanic express specialists, PM inspection specialists, pre/post inspection specialists, transmission specialists, vanbody specialists, mobile repair specialists, parts clerks, parts specialists, transfer drivers, repair dispatch specialists, schedulers, and senior clerks employed by the Respondent at and out of its 1900 South Decatur Boulevard, Las Vegas, Nevada and 989 South Boulder Highway, Henderson, Nevada, repair facilities; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### *B. Refusal to Bargain*

On or about March 19 and August 24, 2004, the Union, by letters, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit.

Since on or about March 19, 2004, the Respondent has failed and refused to recognize and bargain with the Union. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing on and after March 19, 2004, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, U-Haul Company of Nevada, Inc., Henderson and Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time brake/tire specialists, detail specialists, engine specialists, mechanic express specialists, PM inspection specialists, pre/post inspection specialists, transmission specialists, vanbody spe-

[8] The Board's certification of the Union inadvertently excluded the classification of senior clerk. On June 24, 2004, the Union and counsel for the Regional Director filed a joint motion, unopposed by the Respondent, requesting correction of the unit description to include the classification of senior clerk. The Board issued a correction on July 29, 2004.

cialists, mobile repair specialists, parts clerks, parts specialists, transfer drivers, repair dispatch specialists, schedulers, and senior clerks employed by the Respondent at and out of its 1900 South Decatur Boulevard, Las Vegas, Nevada, and 989 South Boulder Highway, Henderson, Nevada, repair facilities; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Henderson and Las Vegas, Nevada, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed either of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time brake/tire specialists, detail specialists, engine specialists, mechanic express specialists, PM inspection specialists, pre/post inspection specialists, transmission specialists, vanbody specialists, mobile repair specialists, parts clerks, parts specialists, transfer drivers, repair dispatch specialists, schedulers, and senior clerks employed by us at and out of our 1900 South Decatur Boulevard, Las Vegas, Nevada, and 989 South Boulder Highway, Henderson, Nevada, repair facilities; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

U-HAUL COMPANY OF NEVADA, INC.